

Skyline Caterers (P.) Ltd. Vs. Ito

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SooperKanoon Citation : sooperkanoon.com/76010

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Dec-28-2007

Judge : K Singhal

Appellant : Skyline Caterers (P.) Ltd.

Respondent : ito

Judgement :

1. The only issue arising in this appeal relates to the disallowance of depreciation of Rs. 3,79,688.

2. Brief facts giving rise to this appeal are these: The assessee is 100 per cent subsidiary of M/s. Radhakrishna Hospitality Services Ltd. (RHSL). It is engaged in the business of providing catering, house-keeping and allied services to Hindustan Lever Limited (HLL). At this stage, it may be mentioned that such catering business was earlier carried on by Mr. Rui Smith, proprietor of M/s. Skyline Caterers. The agreement was entered into between the assessee and Mr. Rui Smith on 16-8-2000 for taking over the catering contract of M/s. Skyline Caterers with HLL with effect from 1-9-2000 against a consideration of Rs. 27 lakhs. Mr. Rui Smith had been carrying on such business for the last 30 years. The amount so paid by the assessee was reflected in its Balance Sheet as Goodwill, on which depreciation at the rate 25 per cent was claimed treating the same as intangible asset. In the course of assessment proceedings, the assessee was asked to explain as to why depreciation on goodwill should not be disallowed. In response to the same, the explanation of the assessee was that it was entitled to

depreciation in respect of intangible assets as well as in respect of commercial rights acquired by the assessee. The payment under the head 'Goodwill' in the books of assessee represented the rights under the contract acquired by the assessee which amounted to commercial rights and therefore, the depreciation was allowable under Section 32.

However, the assessing officer was not satisfied with the explanation of the assessee since in his view, the goodwill does not find place in Section 32 as part of intangible assets which included only know-how, patents, copyrights, trademarks, etc. He was also of the view that the expression 'similar nature' in Section 32(1)(ii) would not include the goodwill. Accordingly, he disallowed depreciation claimed by the assessee.

3. The matter was carried in appeal before the learned Commissioner (Appeals) before whom the submissions raised before the assessing officer were reiterated. It was also submitted that recent decision of the Tribunal, Ahmedabad Bench, in the case of Bharatbhai J. Vyas v. ITO (2005) 97 ITD 248 was not applicable to the present case since the facts were different. It was also contended that where two views are possible then the one which is favourable to the assessee should be adopted in view of the Supreme Court judgment in the case of CIT v. Vegetable Products Ltd. . It was also submitted that the word 'Goodwill' encompasses, in its fold, all those assets which are listed in Section 32 as intangible assets. The learned Commissioner (Appeals) found that the sum of Rs. 27 lakhs paid by the assessee included the sum of Rs. 2 lakhs paid for non-compete clause in the agreement and the balance amount of Rs. 25 lakhs was paid for taking over the contract which Mr. Rui Smith had with HLL. The learned Commissioner (Appeals) after considering the various clauses of the agreement observed as under ; (i) Mr. Rui Smith will not be doing catering business in respect of Hindustan Lever Limited for 7 years; (iii) It will be communicated to M/s. Hindustan Lever Limited that Mr. Rui Smith is still involved in the catering business and for this assistance and involvement, Mr. Rui Smith will further be paid a sum of Rs. 1,000 for every visit.

Proceeding further, it was observed by him that initially assessee had considered the payment as goodwill but later on shifted its stand by stating that nomenclature is not relevant and the Goodwill, by itself, may not be intangible asset under Section 32 but all intangible assets together would comprise as goodwill. However, the learned Commissioner (Appeals) was not satisfied with the submissions made by the assessee since in his view, that the payment made by the assessee neither related to know-how nor patent nor trade mark nor any other intangible asset specified in Section 32(1)(ii)- He also rejected the contention of the assessee that commercial right was acquired. According to the learned Commissioner (Appeals), Mr. Rui Smith could not have assigned the rights under contract in favour of the assessee in view of Clause 2 of the agreement. It was also observed by him that the right to carry on the catering business in the canteen of HLL was entirely dependent on HLL and the assessee was responsible to obtain such permission from HLL Mr. Smith had no obligation in this regard. Accordingly, it could not be said that assessee-company had acquired any commercial right.

Lastly, he was of the view that the entire payment was in fact on account of non-compete which amounted to capital expenditure not covered by Section 32(1)(ii) of the Act. The order of the assessing officer was therefore upheld by the learned Commissioner (Appeals).

Aggrieved by the same, the assessee is in further appeal before the Tribunal.

4. Both the parties have been heard at length. The learned Counsel for the assessee, Mr. Mistri, has assailed the order of learned Commissioner (Appeals) by submitting-(i) that the nomenclature under which the entry is passed in the books of account is not relevant in deciding the nature of the transaction. The real nature of the transaction has to be seen with reference to the agreement between the parties; (ii) that the learned Commissioner (Appeals) was not justified in holding that the entire payment was made for non-compete clause in the agreement and consequently, the payment was on account of capital expenditure which can neither be described as goodwill or commercial right; (iii) that the perusal of the agreement shows that the sum of Rs. 25 lakhs was paid for acquiring the contract of catering between Mr. Rui Smith and HLL and Rs. 2 lakhs was paid in respect of

non-compete clause. Such commercial right is an intangible asset akin to other intangible assets specified in Section 32(1)(ii) of the Act and, therefore, assessee is entitled to depreciation. Proceeding further, it was submitted by him that no adverse inference can be drawn merely on the ground that assessee was to obtain confirmation from HLL and there was no obligation of Mr. Rui Smith to get the contract transferred in the name of assessee. The decision of the Tribunal in the case of Bharatbhai J. Vyas (supra) is distinguishable on facts inasmuch as that case related to mere goodwill simplicitor paid to the retiring partner which is not the case in the present appeal. On the other hand, the learned Departmental Representative has strongly relied on the orders of the lower authorities. Since all the reasoning of lower authorities have already been narrated in the order, the same need not be repeated.

5. Rival submissions of the parties have been considered carefully. The question for our consideration is whether the assessee can be said to have acquired the commercial right in terms of Section 32(1)(ii) of the Act so as to claim the depreciation. There is no dispute to the legal proposition that the nomenclature given to the entries in the books of account is not relevant for ascertaining the real nature of the transaction as held by the Hon'ble Supreme Court in the case of Kedamath Jute Mfg. Co. Ltd. v. CIT . Therefore, in my opinion, the nature of transaction should be ascertained on the basis of the agreement between the parties.

6. The agreement between the parties appearing at pages 11 to 14 of the paper book has been perused carefully. Mr. Rui Smith has been described as party of the First Part while the assessee has been described as the Party of the Second Part. This agreement was entered into on 16-8-2000.

The preamble of the agreement shows that party to the First Part had been carrying on the business of catering services exclusively at HLL canteen located at Backbay Reclamation, Mumbai for the last 30 years as sole proprietor of M/s. Skyline Caterers. On the other hand, the assessee is a 100 per cent subsidiary of RHSL who are in the business of institutional foods and services management and allied services. The Party of the Second Part approached the Party of the First

Part with an offer to take over the catering contract of the party of the First part at HLL canteen effective from 1-9-2000 on the terms and conditions mentioned in the agreement. The sum of Rs. 25 lakhs was agreed to be paid by the Party of the Second Part to the Party of the First Part as a consideration for assigning all the rights under the said contract and further sum of Rs. 2 lakhs was agreed to be paid on account of non-compete clause. Clause 2 of the agreement provides that it shall be the entire endeavour and responsibility of the Party of the Second Part to obtain the confirmation of HLL but the Party of the First Part shall assist the Party of the Second Part in whatever way the Party of the Second Part desires. Clause 4 provides that Party of the First Part shall inform HLL that he is also involved in the Party of the Second Part. Clause 5 shows that Party of the First Part has agreed to hand over all the articles and paraphernalia belonging to him and the Second Party shall be entitled to the same as owner thereof. Clause 7 provides that all the liabilities of the First Party up to effective date shall be discharged by him.

7. The combined reading of all the clauses and the preamble reveals that assessee had paid the sum of Rs. 25 lakhs for acquiring all the rights under the contract between the First Party and HLL as well as certain assets belonging to the First Party. On the other hand, the sum of Rs. 2 lakhs has been paid on the ground that the first party shall not compete with the assessee either by himself or through his agents in any business of catering at HLL canteen. In my considered opinion, the learned Commissioner (Appeals) was not justified in holding that the entire sum of Rs. 27 lakhs was paid for noncompete clause. The payment of Rs. 25 lakhs was specifically made for acquiring all the rights under the catering contract between Mr. Rui Smith and HLL and for acquiring articles and paraphernalia belonging to the First Party which were lying in the canteen. Since the payment related to the acquisition of rights under the contract, it cannot be said that payment was either on account of goodwill or on account of non-compete clause. Merely because assessee showed the said payment on account of goodwill in the books of account no adverse inference can be drawn against the assessee.

8. The learned Commissioner (Appeals) has relied on the Clause 2 of the agreement to point out that there was no obligation on Mr. Rui Smith to get the

contract transferred and infect Mr. Rui Smith could not have done it legally. In my opinion, no adverse inference can be drawn on this ground. In the commercial agreements when the rights under the contract are transferred then mutual understanding is usually arrived at between the parties in such a way that joint efforts are made to make the transaction and agreement effectively. No doubt, the assessee was required to obtain the confirmation of HLL but at the same time, Mr. Smith was required to assist the assessee in getting the contract transferred in assessee's name, (Clause 2 of the agreement). It also appears from Clause 4 which provides that Mr. Smith shall inform HLL that he is still involved in the assessee-company. All this arrangement was made in order to get the said contract transferred in the name of assessee so as to make the agreement effective. That does not mean that payment was not made for acquiring the rights under the contract. The substance of the agreement was to acquire all the rights in the contract. Accordingly, it is held that the payment of Rs. 25 lakhs was paid by the assessee for acquiring all the rights in the said contract as well as all the articles and paraphernalia belonging to Mr. Smith which were lying at the canteen.

9. The next question for consideration is whether the rights acquired under the contract can be said to be intangible asset within the ambit of Section 32(1)(ii) which reads as under: (ii) Know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 1-4-1998.

The perusal of the above shows that Legislature has specified certain intangible assets on which depreciation can be claimed namely know-how, patents, copyrights, trademarks, licences, franchises. These specific intangible assets are followed by the expression 'any other business or commercial rights of similar nature'. The expression mentioned above by itself would include all kinds of commercial rights but for the words 'similar nature'. In such situation, the rule of ejusdem generis would apply. The scope of the rule is that words of a general nature following specific, and particular words should be construed as limited to things which are of the same nature as those specified. The general words take the colour from the specific words. The specific words in the above section reveal the similarity in the sense that all the intangible assets specified are tools of the

trade which facilitate the assessee carrying on the business. Therefore, in my opinion, the expression 'any other business or commercial rights of similar nature' would include such rights which can be used as a tool to carry on the business. If this test is applied, then the rights acquired by the assessee under the agreement would fall within the expression mentioned above, since catering business at HLL canteen could be carried on only with the help of such rights under the contract and consequently, the assessee would be entitled to depreciation.

10. At this stage, it may be mentioned even for the sake of repetition that assessee had not only acquired the rights under the contract but also articles and paraphernalia lying in the canteen of HLL as stated in Clause 5 of the agreement. Such articles being tangible assets would be eligible for depreciation under the Clause (i) of Section 32(1) and therefore value of the same will have to be ascertained by the assessing officer and the balance amount shall be allocated for the intangible asset for the purpose of granting depreciation under Clause (ii) of Section 32(1).

11. Before parting with his issue, it would be appropriate to refer to the decision of the Tribunal in the case of Bharatbhai J. Vyas (supra) to which reference has been made by the learned Commissioner (Appeals) in his order. In that case, the assessee had paid sum of Rs. 15.15 lakhs to the retiring partner on account of goodwill and claimed depreciation thereon under Section 32(1)(ii) of the Act. The claim of the assessee was rejected by the assessing officer as well as learned Commissioner (Appeals) and by the Tribunal also. It was observed by the Tribunal that goodwill simplicitor cannot be treated as intangible asset in terms of Section 32(1)(ii). That decision cannot be applied to the present case for the reason that payment in the present case does not represent the goodwill but represents the commercial right under the agreement. Hence, the said decision is distinguishable and doesn't help the revenue.

12. In view of the above discussion, the order of the learned Commissioner (Appeals) is set aside and the assessing officer is directed to allow the depreciation in the light of this order.